

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

TRANSFERRING FIRST-CLASS MAIL PARCELS
TO THE COMPETITIVE PRODUCT LIST

Docket No. MC2015-7

**UNITED STATES POSTAL SERVICE RESPONSE TO SUPPLEMENTAL
COMMENTS OF GAMEFLY, INC.**
(February 5, 2015)

In Order No. 2255,¹ the Commission solicited comments on the Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List. In that order, the Commission required that comments be filed no later than December 17, 2014. Two parties filed timely comments, GameFly, Inc. (“GameFly”) and the Public Representative (“PR” or “Public Representative”).² On January 7, 2015, the Postal Service filed reply comments (“Reply Comments”).³ GameFly filed supplemental comments (“Supplemental Comments”) on January 28, 2015.⁴

¹ Order No. 2255, Notice and Order Concerning Transfer of First-Class Mail Parcels to the Competitive Product List, PRC Docket No. MC2015-7 (Nov. 20, 2014).

² See Comments of GameFly, Inc. (hereinafter “GameFly Initial Comments”), PRC Docket No. MC2015-7 (Dec. 17, 2014); Public Representative Comments, PRC Docket No. MC2015-7 (Dec. 17, 2014).

³ Reply Comments of the United States Postal Service (“USPS Reply Comments”), PRC Docket No. MC2015-7 (Jan. 7, 2015).

⁴ Supplemental Comments of GameFly, Inc. (“GameFly Supplemental Comments”), PRC Docket No. MC2015-7 (Jan. 28, 2015) (modified on Jan. 29, 2015). In light of the passed comment deadline, GameFly accompanied its Supplemental Comments with a motion for leave to file them. Motion of GameFly, Inc. for Leave to File Supplemental Comments (hereinafter “GameFly Motion”), PRC Docket No. MC2015-7 (Jan. 28, 2015), at 1-3. The Postal Service does not oppose that motion, although it believes that the motion is poorly-supported with respect to the portion of GameFly’s Supplemental Comments that discusses the Private Express Statutes. See infra section IV.

The Postal Service hereby responds to GameFly's Supplemental Comments. As explained below, the analysis of monopoly power and market dominance under 39 U.S.C. 3642(b)(2) described by the Postal Service in its Reply Comments is more appropriate for this docket than GameFly's proposed analysis; information submitted by Commenters fails to rebut the Postal Service's position that the competitive classification of First-Class Mail Parcels satisfies section 3642 and will not result in durable monopoly power or market dominance; GameFly's proposed alternative to the "total market" approach to market definition is inconsistent with market conditions and is not feasible for this docket; and GameFly's proposed application of the Private Express Statutes in this docket conflicts with Commission precedent and well established concepts of statutory interpretation.

I. THE ANALYSIS OF MONOPOLY POWER AND MARKET DOMINANCE DESCRIBED IN THE POSTAL SERVICE'S REPLY COMMENTS IS THE MOST APPROPRIATE METHOD OF DETERMINING COMPLIANCE WITH THE REQUIREMENTS OF 39 U.S.C. § 3642.

As explained in the Reply Comments, case law and other legal authorities have developed antitrust concepts that govern the evaluation of monopoly power for a single firm.⁵ These authorities have recognized the extreme difficulty in establishing monopoly power or market dominance through allegations focused solely on profits, margins, or demand elasticities, and have identified the flaws associated with attempts to assess monopoly power or market dominance through these types of allegations.⁶ Because of

⁵ USPS Reply Comments at 4-10.

⁶ Id.; see, e.g., Bailey v. Allgas, Inc., 284 F.3d 1237, 1250-1255 (11th Cir. 2002) (affirming district court finding that evidence of profits and return on assets alone does not establish market power); Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997), judgment aff'd, 525 U.S. 299 (1999), and overruled on other grounds by Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012) (concluding that evidence of high prices and profits does not establish market power); Church & Dwight Co. v. Mayer Labs., Inc., 868

this difficulty, the issue of whether a single entity possesses monopoly power or market dominance is determined by consideration of a number of factors, and focuses on the entity's market share and the conditions that affect market entry (the "Single-Firm Approach").⁷

The Single-Firm Approach is the most appropriate analysis for the evaluation of market dominance under section 3642. The analysis of monopoly power described in the Horizontal Merger Guidelines⁸ and applied in the merger context (the "Merger Approach"), which is touted by GameFly as the analysis appropriate for section 3642, is less suitable for section 3642 cases because it has been developed to measure monopoly power that would exist in the event of a hypothetical combination of multiple entities. Unlike the Merger Approach, which applies to a hypothetical merger situation that is not relevant in the context of a section 3642 case, both the Single-Firm Approach and the section 3642 market dominance evaluation involve the assessment of whether a single, nonhypothetical entity possesses monopoly power or market dominance.

Contrary to GameFly's contentions, application of the Merger Approach to cases involving the assessment of market dominance for purposes of section 3642 is not supported by precedent. The Horizontal Merger Guidelines, which GameFly cites as the primary authority for the Merger Approach favored by GameFly for section 3642

F. Supp. 2d 876, 896-898 (N.D. Cal. 2012), vacated in part, No. C-10-4429-EMC, 2012 WL 1745592 (N.D. Cal. May 16, 2012) (recognizing that evidence of supracompetitive prices alone does not establish market power); In re eBay Seller Antitrust Litigation, No. C-07-01882-JF (RS), 2010 WL 760433, at *4-5 (N.D. Cal. Mar. 4, 2010) (concluding that plaintiff's evidence of elasticities and price increases was insufficient to withstand summary judgment on issue of monopoly power).

⁷ USPS Reply Comments at 9; see, e.g., eBay, 2010 WL 760433, at *6 (citing Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)).

⁸ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) ("MERGER GUIDELINES").

cases, include a disclaimer stating that the Horizontal Merger Guidelines “are not intended [for the analysis of] cases other than horizontal mergers.”⁹ And despite GameFly’s attempt to establish a connection between regulatory decisions concerning maximum rate regulation and the monopoly power analysis applicable to mergers, the Horizontal Merger Guidelines include no reference to maximum rate regulation.¹⁰ Accordingly, there is no basis to conclude that the Department of Justice intended for its Horizontal Merger Guidelines to apply to section 3642 proceedings, or any decisions regarding potential exemption from maximum rate regulation.

Other authorities cited by GameFly reflect a similar lack of support for application of the Merger Approach to section 3642 cases. For example, the Valassis NSA case considered contract prices proposed by the Postal Service, but did not consider whether the Postal Service possessed a dominant position in the relevant market.¹¹ Similarly, one of the D.C. Circuit cases cited by GameFly refers to the Horizontal Merger Guidelines as the source of a general definition of market power, but does not describe the “SSNIP” test or any monopoly power analysis derived from the Horizontal Merger Guidelines.¹²

Notwithstanding the lack of support for application of the Merger Approach to section 3642 cases, GameFly’s justification for proposing the Merger Approach in this

⁹ Id. at 1.

¹⁰ See MERGER GUIDELINES.

¹¹ Order No. 1448, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, PRC Docket Nos. MC2012-14 & R2012-8 (Aug. 23, 2012). GameFly also cites the Commission’s Round-Trip Mailer decision. GameFly Supplemental Comments at 4 (citing Order No. 2306, Order Denying Request, PRC Docket No. MC2013-57 (Dec. 23, 2014), at 18). The Commission’s order in that case is currently pending judicial review. See Pet. for Review, United States Postal Serv. v. Postal Regulatory Comm’n, No. ___ (filed Jan. 21, 2015).

¹² See Mobil Pipeline Co. v. FERC, 676 F.3d 1098, 1100, 1102 (D.C. Cir. 2012).

docket reflects an inaccurate understanding of antitrust concepts and the issues central to section 3642 considerations. Specifically, GameFly misrepresents that the section 3642 analysis involves an evaluation of potential conduct, and that the Horizontal Merger Guidelines analysis is the only analysis that considers potential, rather than actual conduct.¹³

As described below, the section 3642 analysis concerns the Postal Service's market position, and not its conduct. Even if one assumes that the section 3642 analysis involves consideration of potential conduct of the Postal Service, the Single-Firm Approach incorporates the evaluation of potential conduct, where relevant.

The Single-Firm Approach involves multiple analytical stages, and evaluation of the market position of the relevant entity and the competitive structure of the relevant market occurs independent of the review of the challenged conduct.¹⁴ This approach reflects the requirement in monopolization and attempted monopolization cases that the relevant entity possesses monopoly power or has a dangerous probability of achieving monopoly power.¹⁵ Because section 3642 cases focus on the market position of the Postal Service rather than specific conduct of the Postal Service, the Single-Firm Approach is most appropriate, and GameFly's attempt to exclude the Single-Firm Approach on the basis of its alleged unsuitability for the assessment of conduct is misguided.

GameFly's focus on the consideration of potential anticompetitive conduct as the primary justification for applying the Merger Approach to section 3642 cases reveals its

¹³ See GameFly Supplemental Comments at 5.

¹⁴ See, e.g., Church & Dwight, 868 F. Supp. 2d at 890-921.

¹⁵ Id. at 915-916.

confusion regarding the issues relevant to the section 3642 analysis, and the nature of different approaches to the evaluation of monopoly power. Contrary to GameFly's arguments, the Single-Firm Approach often involves the consideration of potential conduct.¹⁶ So even though conduct is not relevant to the market dominance evaluation under section 3642, if it were, the capability to consider potential anticompetitive conduct would not serve as a basis for distinguishing between the Single-Firm Approach and the Merger Approach.

As described above, the Merger Approach, which is intended only for application to monopoly power analysis in the merger context, is not suitable for the market dominance evaluation under section 3642. GameFly has failed to rebut the Postal Service's position regarding application of the Single-Firm Approach to section 3642 cases, and the Commission should apply the Single-Firm Approach in this docket.

II. COMMENTERS' REPRESENTATIONS DO NOT ESTABLISH MONOPOLY POWER OR MARKET DOMINANCE FOR PURPOSES OF 39 U.S.C. § 3642.

In its Reply Comments, the Postal Service described the antitrust principles concerning monopoly power and market dominance for purposes of 3642, identified flaws in Commenters' assertions regarding antitrust law and market dominance, and explained how Commenters' reliance on pricing data to demonstrate market dominance was inconsistent with antitrust concepts.¹⁷ In its response, GameFly relies on the same

¹⁶ See U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, 2008 WL 4606679, at *30 (2008) ("[A]ctual or potential anticompetitive effects can be useful in a section 2 case.") (citing Sherman Act Section 2 Joint Hearing: Monopoly Power Session, Hr'g Tr. 40, 63, 2526, 4449, 114119, March 7, 2007 and Sherman Act Section 2 Joint Hearing: Academic Testimony, Hr'g Tr. 90, 17476, Jan. 31, 2007). This report was withdrawn pursuant to a decision to revisit issues relating to the application and enforcement of Section 2 of the Sherman Act to exclusionary or predatory conduct, but the withdrawal does not suggest disagreement with the report's summary of general principles applicable to Section 2 monopoly power analysis.

¹⁷ USPS Reply Comments at 4-10.

types of data to support its allegations of market dominance, and these allegations suffer from the same flaws identified in the Reply Comments, the most serious of which is the failure to address the lack of durability of the Postal Service's alleged market dominance associated with the First-Class Mail Parcels product.

As explained in the Postal Service's Reply Comments, to reach the level of monopoly power or market dominance for purposes of section 3642(b)(1), market power must be durable, or capable of preservation over a substantial period of time.¹⁸ Short-term supracompetitive prices do not demonstrate monopoly power or market dominance.¹⁹ Because prices for First-Class Mail Parcels were below competitive levels until Fiscal Year (FY) 2014, it is impossible to establish through existing First-Class Mail Parcels pricing data that the Postal Service possesses durable market power for First-Class Mail Parcels,²⁰ or that alleged supracompetitive pricing reflects long-term monopoly power or market dominance rather than a short-term adjustment to address increased demand arising from the growth of ecommerce or other changes in market conditions.²¹

¹⁸ Id.; 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801, at 318 (2d ed. 2002) ("It is generally reasonable to presume that a firm has monopoly power when the firm's dominant market share has lasted, or will last, for at least five years.").

¹⁹ Bailey, 284 F.3d at 1253-1254.

²⁰ First-Class Mail Parcels had a cost coverage of 98.5 percent in FY2012 and 99.5 percent in FY2013, rising above the breakeven point only in FY2014 (according to data filed after the evidence submitted in this docket). Annual Compliance Determination Report for Fiscal Year 2012, PRC Docket No. ACR2012 (rev. May 7, 2013), at 81; Analysis of United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2013, PRC Docket No. ACR2013 (rev. Apr. 10, 2014), at appx. A; United States Postal Service, FY2014 Annual Compliance Report, PRC Docket No. ACR2014 (Dec. 29, 2014), at 7, table 1.

²¹ See Natalie DiBlasio, USPS Delivers Record Number of Packages, USA TODAY, Dec. 23, 2014, available at <http://www.usatoday.com/story/money/business/2014/12/23/package-postal-service-delivery-holiday/20813279>.

Like the interpretation of First-Class Mail Parcels prices in GameFly's original Comments, the pricing information presented in GameFly's Supplemental Comments does not address the durability of any alleged monopoly power with respect to First-Class Mail Parcels. A single one-year price increase, regardless of its size, cannot establish the durability of market power because, at most, it serves as a short-term reflection of market power.²² GameFly's contention that "none of the Postal Service's filings in this docket, R2015-4 and CP2015-33 suggest that the Postal Service intends that its proposed price increases will be temporary" does not suggest the existence of durable market power. GameFly does not cite any statements indicating that price increases will be permanent, or that prices will significantly exceed competitive levels over a long period of time. Here, GameFly's use of a single price increase is an even less effective indicator because GameFly has not provided information regarding costs or other factors that could influence First-Class Mail Parcels prices, and are essential to the evaluation of whether price increases reflect monopoly power.²³

As described above, GameFly's assertions regarding the pricing of First-Class Mail Parcels do not support a finding of monopoly power or market dominance under section 3642 with respect to First-Class Mail Parcels.

III. THE TOTAL MARKET APPROACH IS THE MOST EFFECTIVE METHOD OF EVALUATING PARCEL PRODUCTS UNDER 39 U.S.C. § 3642.

As described in the Reply Comments, the Commission's assessment of market dominance for purposes of section 3642 should focus on the national market for the

²² See AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 801 at 318. Cf. Nick Carey, FedEx, UPS Recalculate, Raise Rates, Daily Finance.com, Dec. 31, 2014, <http://www.dailyfinance.com/2014/12/31/fedex-ups-recalculate-raise-rates> (describing a 45-percent price increase issued by FedEx and UPS).

²³ See supra note 6.

First-Class Mail Parcels product and substitutes for this product.²⁴ Commission precedent supports this “total market” approach, and GameFly has not identified a feasible alternative.

GameFly proposes an alternative approach to market definition that is inconsistent with market conditions faced by the First-Class Mail Parcels product. As described below, the First-Class Mail Parcels product is subject to competitive pressures that extend to all customer types and permeate all geographic areas. Because of the universal scope of competitive pressure, there is no basis for segmenting the market based on customer type or geographic location, or in any other increment less than the total market.

GameFly’s attempt to limit the relevant market in this docket based on customer type, customer location, and parcel weight reflects a myopic understanding of the competitive and regulatory pressures that impact Postal Service decisions regarding the First-Class Mail Parcels product. Most importantly, GameFly fails to recognize the blurred boundaries between different customer segments, the overlap among the products used by “business customers” and those used by other customers, and the expansion of access to commercial rates for all customer types. For example, an increasing number of customers, including individual customers who reside in more remote geographic areas, are obtaining access to commercial rates offered by the Postal Service and its competitors through eBay and other e-commerce platforms, promotions involving free shipping and free returns, and Click-N-Ship.²⁵ And as

²⁴ USPS Reply Comments at 10-15.

²⁵ See, e.g., eBay, Savings from the U.S. Postal Service, <http://pages.ebay.com/usps/USPSSavings.html>; Nordstrom, Free Shipping Free Returns, <http://shop.nordstrom.com/c/free-shipping>; Zappos.com,

commercial rates become increasingly available to individual mailers, the distinction between “bulk” and “single-piece” mailers fades away. Accordingly, GameFly’s proposed narrow market definition based on customer size or type is inconsistent with actual market conditions and antitrust concepts.

In addition to GameFly’s failure to recognize the erosion of customer segmentation based on geographic location or customer type, GameFly’s reasoning ignores the competitive pressure applied by potential competitors. For all customers, even those who reside in more remote geographic locations, First-Class Mail Parcels prices are restricted not only by regulatory requirements and existing competition, but also by potential competition. As discussed in the Reply Comments, the parcel delivery market has low barriers to entry, and competitors can emerge quickly to respond to new opportunities.²⁶ These barriers to entry are lowest for lightweight parcels because the transportation and delivery of small, lightweight parcels requires no new equipment or capacity expansion.²⁷ And contrary to GameFly’s argument, where opportunities arise from a competitor’s price increase, an increase in demand, or other market changes, an existing delivery company has the ability to redistribute its transportation vehicles and equipment to in effect substitute transportation between two points for transportation between two other points. Similarly, with respect to GameFly’s concerns regarding price differences affecting parcels with different weights, where opportunities arise from changes in market conditions, delivery companies have the ability to reallocate capacity

Shipping and Returns, <http://www.zappos.com/shipping-and-returns>. See generally Response of the United States Postal Service to Chairman’s Information Request No. 1, PRC Docket No. MC2015-7 (Dec. 16, 2014), at 9 (response to question 3(e)(i)).

²⁶ USPS Reply Comments at 10.

²⁷ Id.

reserved for heavier weight parcels to lightweight parcels, which could lead to reduced prices for lightweight parcel products.

For the reasons described above, the approach to market definition proposed by GameFly does not reflect consideration of actual market conditions, or the competitive pressure applied by potential competition. Accordingly, the “total market” approach to market definition described in the Reply Comments remains the most effective method of evaluating parcel products under 39 U.S.C. § 3642.

IV. GAMEFLY OFFERS NO COMPELLING REASON FOR THE COMMISSION TO REVERSE PRECEDENT IN FAVOR OF GAMEFLY’S IMPRACTICAL APPROACH TO THE PRIVATE EXPRESS STATUTES.

As an initial matter, while the Postal Service does not oppose GameFly’s Motion for Leave to File Supplemental Comments, the Postal Service would like to draw the Commission’s attention to the opportunism reflected in section IV of GameFly’s Supplemental Comments. In contrast to the other sections of those Supplemental Comments, which discuss developments that occurred after the close of the comment period and the Postal Service’s alleged misrepresentation of governing law,²⁸ GameFly’s inclusion of additional arguments concerning the Private Express Statutes bespeaks nothing more than GameFly’s desire for another bite at the apple.

The only rationale offered in GameFly’s Motion is that “the Postal Service’s reply comments have advanced a number of other arguments, and cited a number of purported authorities, that are matters of first impression for the Commission in Section 3642 product transfer cases.”²⁹ Yet one will search section III of the Postal Service’s

²⁸ GameFly Motion at 1-3.

²⁹ Id. at 4.

Reply Comments in vain for such novel arguments and authorities. Instead, the reader will find a series of paragraphs that summarize and critique arguments advanced in GameFly's initial comments and explain why past Commission decisions support the Postal Service's approach rather than GameFly's.³⁰ That the Commission has ruled on this precise issue several times in the past may have been news to GameFly, but that does not make it a "matter[] of first impression for the Commission." The Commission should give due weight to the GameFly's untimely, ill-excused additional discourse.

Many of GameFly's substantive remarks on this topic offer nothing new and are ably anticipated in the Postal Service's Reply Comments. The Postal Service takes particular issue with three fallacious points in response to its Reply Comments, however. First, GameFly's strict-constructionist rhetoric is overblown. In one of the very cases that GameFly cites, the Supreme Court has acknowledged that plain language ends the interpretive inquiry only "if the statutory language is unambiguous and the statutory scheme is coherent and consistent."³¹ Section 601(b)(1) may be "coherent and consistent" in its establishment of an outward-facing monopoly, but the same cannot be said of Section 3642(b)(2)'s importation of Section 601(b)(1) into an inward-looking product classification scheme. The other cases that GameFly cites serve it no better. For instance, in Cook, the court determined that crediting the defendant's absurdity argument would actually produce, not avoid, "unwarranted

³⁰ It is not clear why GameFly's implied distinction between product transfer cases and other product classification cases should matter, since Section 3642 applies equally to both. Be that as it may, this question has arisen in at least one prior product transfer case. USPS Reply Comments at 18 fn.67 (citing, *inter alia*, Order No. 2160, Order Approving Product List Transfer, PRC Docket No. MC2014-28 (Aug. 19, 2014), at 5).

³¹ Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (emphasis added, citation and internal quotation marks omitted).

sentencing disparities.”³² Here, it is clear that the Commission’s precedents crediting the Postal Service’s view have produced no similar irrationality, whereas GameFly’s approach would have the extreme result of consigning many otherwise-competitive parcel products to the market dominant product list. Nor has GameFly attempted to overcome the seeming absurdity of its proposed interpretation by explaining why that approach might be consistent with Congressional intent.³³ It is difficult to conceive of how GameFly might do so, given that GameFly’s approach would actually confine the very pricing and product flexibility that Congress expressly intended to give the Postal Service when it enacted Section 3642.³⁴

Second, GameFly has no effective response to the Postal Service’s point about the broader consequences of GameFly’s theory. GameFly asserts that “the Postal Service gains nothing with its *reducto [sic] ad absurdum* about a ‘\$5.25 Priority Mail item’” because “Congress has specifically defined priority mail . . . as competitive without regard to whether some of the matter entered in this mail might be subject to the Private Express Statutes. 39 U.S.C. § 3631(a).”³⁵ Yet in the very same paragraph that GameFly professes fealty to “the plain language of the statute” and the “anti-surplusage canon of statutory interpretation,” and immediately after devoting a paragraph to admonishing the Commission about the impermissibility of rewriting a statute, GameFly chooses to account for only half of Section 3631(a). True, Section 3631(a) includes an

³² United States v. Cook, 594 F.3d 883, 891 (D.C. Cir. 2010).

³³ See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005) (reasoning that an “omission [of a given cross-reference from a list of statutory exceptions] may seem odd, but it is not absurd,” because of the existence of “[a]n alternative explanation for the different treatment of” those rules). GameFly quotes selectively from this very paragraph in its Supplemental Comments at 20.

³⁴ See USPS Reply Comments at 17 fn.65.

³⁵ GameFly Supplemental Comments at 20-21 (citing USPS Reply Comments at 16-17).

initial list of presumptive competitive products, but Congress expressly subjected that list to “any changes the Postal Regulatory Commission may make under section 3642.” GameFly’s proposed interpretation, combined with a true application of the anti-surplusage canon to Section 3631(a), would put Sections 3631(a) and 3642(b)(2) on a collision course. It would make little sense for Congress to initially determine that Priority Mail and Bulk Parcel Post are competitive products, only to have Section 3642(b)(2) compel the Commission immediately to reclassify these products as market-dominant because of Section 601(b)(1).³⁶ This nonsensical reading plainly clears whatever “‘high threshold’ of unreasonableness” GameFly wishes to invoke.³⁷

Third, GameFly attempts to distinguish the Commission’s prior decisions on this very issue because those “cases all involved bilateral agreements voluntarily entered into by large and sophisticated counterparties that indisputably possessed substantial countervailing market power, [which] special circumstances provided reasonable assurance that the terms of the arms-length agreements were the result of effective competition for the Postal Service’s international services.”³⁸ In other words, despite drawing the Commission’s attention to “[t]he omission of any statutory rule of reason from Section 3642(b)(2)” and the “irrelevan[ce]” of competitive conditions to Section 3642(b)(2) on the previous page,³⁹ GameFly would have the Commission disregard its

³⁶ Again, under GameFly’s proposed interpretation, all that would matter would be whether Section 601(b)(1) might prevent some theoretical (and improbably irrational) competitor from charging a price below the price floor, never mind how much margin for competition actually exists between the price floor and the Postal Service’s or its real-world competitors’ prices. See GameFly Initial Comments at 20-21; GameFly Supplemental Comments at 21. This argument could apply just as easily to certain Priority Mail parcels as to First-Class Mail Parcels. See USPS Reply Comments at 16-17.

³⁷ Id. at 20.

³⁸ Id. at 22.

³⁹ Id. at 21.

precedents because of a made-up gloss on Section 3642(b)(2) that exempts bilateral agreements with foreign postal operators due to supposed competitive conditions.⁴⁰

Double-speak aside, GameFly's distinction is without a difference here. It does not matter whether a postal product is offered to a foreign postal operator, a large domestic business, or a retail customer: all that matters to Section 3642(b)(2) is whether the Private Express Statutes apply. Inbound international mail is no less subject to the Private Express Statutes than is domestic mail, and the exceptions to the Private Express Statutes make no distinction between the two.⁴¹ The Commission has repeatedly adopted the Postal Service's approach to Section 3642(b)(2) to classify products as competitive; neither the identity of those products' customers nor the origin of the underlying mailpieces bears on the validity of this interpretive approach to the Section 601(b)(1)'s price test.⁴²

V. CONCLUSION

The materials submitted by the Postal Service in this docket establish that the proposed transfer of First-Class Mail Parcels from the market dominant product list to the competitive product list satisfies the applicable criteria set forth in section 39 U.S.C. § 3642. GameFly has offered no reasoned basis for the Commission to find otherwise.

⁴⁰ GameFly does not account for the fact that the Commission has approved two competitive product classifications based on the price test that did not involve bilateral agreements, but rather the equivalent of published rates. See USPS Reply Comments at 18 fn.67 (citing, *inter alia*, Order No. 362, Order Adding Inbound Air Parcel Post at UPU Rates to Competitive Product List, PRC Docket Nos. MC2010-11 & CP2010-11 (Dec. 15, 2009), at 7-8; Order No. 2160, Order Approving Product List Transfer, PRC Docket No. MC2014-28 (Aug. 19, 2014), at 5).

⁴¹ While there is a blanket exception to the Private Express Statutes for outbound international mail, this does not extend to inbound international mail. See 39 U.S.C. § 601(b)(3); 39 C.F.R. § 320.8.

⁴² See USPS Reply Comments at 18-19 & fn.67.

Accordingly, the Commission should approve the transfer of First-Class Mail Parcels to the competitive product list.

Respectfully submitted,

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